

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
United Power Line Council's Petition for)	WC Docket No. 06-10
Declaratory Ruling Regarding the Classification)	
of Broadband over Power Line Internet Access)	
Service as an Information Service)	

MEMORANDUM OPINION AND ORDER

Adopted: November 3, 2006

Released: November 7, 2006

By the Commission: Chairman Martin and Commissioner Tate issuing separate statements; Commissioners Copps and Adelstein concurring and issuing separate statements; Commissioner McDowell abstaining.

I. INTRODUCTION

1. In this Memorandum Opinion and Order (Order), we classify Broadband over Power Line (BPL)-enabled Internet access service to be an information service under the Communications Act of 1934, as amended (Communications Act or Act).¹ Additionally, we find that the transmission component underlying BPL-enabled Internet access service is "telecommunications," and that the offering of this telecommunications transmission component as part of a functionally integrated, finished BPL-enabled Internet access service offering is not a "telecommunications service." Further, we find that neither the Communications Act nor relevant precedent mandates that broadband transmission be a "telecommunications service" when provided to an Internet service provider (ISP) as a wholesale input for the ISP's own BPL-enabled Internet access service offering, but that the BPL provider may choose to offer it as such.

2. In reaching these determinations, we remove regulatory uncertainty regarding the classification of this service.² This approach is consistent with the framework that the Commission established for cable modem service and wireline broadband Internet access service, as it establishes a minimal regulatory environment for BPL-enabled Internet access service that promotes our goal of ubiquitous availability of broadband to all Americans.³ This Order also furthers the Commission's goal

¹ 47 U.S.C. §§ 151 *et seq.*

² Commission rule 1.2 provides the Commission with the authority to issue declaratory rulings to remove an uncertainty. *See* 47 C.F.R. § 1.2; *see also* 5 U.S.C. § 554(e) (stating that an agency, "in its sound discretion, may issue a declaratory order to . . . remove uncertainty").

³ *See* 47 U.S.C. § 157 nt; *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185 & CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4801, para. 4 (2002) (*Cable Modem Declaratory Ruling*), *aff'd*, *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services*, 125 S. Ct. 2688 (2005) (*NCTA v. Brand X*); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*; (continued....)

of developing a consistent regulatory framework across broadband platforms by regulating like services in a similar manner.⁴

II. BACKGROUND

A. UPLC's Petition for Declaratory Ruling

3. On December 23, 2005, UPLC filed a petition for declaratory ruling requesting that the Commission find that BPL-enabled Internet access service is an information service as defined in the Act.⁵ UPLC requests that the Commission remove any uncertainty about whether BPL-enabled Internet access service is subject to Title II of the Act.⁶ As described in the Petition, BPL is a nascent industry, which continues to develop.⁷ In its petition, UPLC argues that BPL-enabled Internet access service is like other broadband services, including cable modem service and digital subscriber line service (DSL), that are classified as information services, and thus BPL-enabled Internet access service should be classified as an information service.⁸ Specifically, UPLC argues that BPL-enabled Internet access service is “an integrated finished service that combines computer processing with transport capabilities, like cable modem and DSL services.”⁹ Additionally, UPLC asserts that classifying BPL-enabled Internet access service as an information service would serve the public interest because it would remove regulatory uncertainty and promote broadband access and competition.¹⁰ The Wireline Competition Bureau issued a
(Continued from previous page) _____

1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements; Conditional Petition of the Verizon Telephone Companies for Forbearance Under 47 U.S.C. § 160(c) with Regard to Broadband Services Provided via Fiber to the Premises; Petition of the Verizon Telephone Companies for Declaratory Ruling or, Alternatively, for Interim Waiver with Regard to Broadband Services Provided Via Fiber to the Premises; Consumer Protection in the Broadband Era, CC Docket Nos. 02-33, 01-337, 95-20, and 98-10 & WC Docket Nos. 04-242 and 05-271, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853, 14855, para. 1 (2005) (Wireline Broadband Internet Access Services Order or Consumer Protection in the Broadband Era Notice), petitions for review pending, Time Warner Telecom v. FCC, No. 05-4769 (and consolidated cases) (3rd Cir. filed Oct. 26, 2005).

⁴ See *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14862, para. 11 n.30 (stating that while the Commission was not addressing classification issues of other non-wireline broadband Internet access services in the *Wireline Broadband Internet Access Services Order*, it will act consistent with the analysis and conclusions reached therein).

⁵ Petition of the United Power Line Council for a Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service at 1 (filed Dec. 23, 2005) (UPLC Petition or Petition); see also 47 U.S.C. § 153(20) (defining information service). UPLC is an “alliance of utilities and their technology and service provider partners to develop BPL solutions in North America.” UPLC Petition at 2. UPLC asserts that approximately 70 companies are members of UPLC and that practically every electric utility and technology company that is engaged in the deployment of BPL is a member. See UPLC Comments at 2.

⁶ See UPLC Petition at 1.

⁷ See *id.* at 2.

⁸ See *id.* at 3-5.

⁹ *Id.* at 3.

¹⁰ See *id.* at 5-8.

public notice requesting comment on the petition.¹¹

B. Relevant Proceedings

1. Prior Commission BPL Proceedings

4. The Commission has previously addressed certain technical aspects of BPL as part of its ongoing proceedings on this technology. In 2003, the Commission opened a proceeding to determine whether changes to Part 15 of its rules were necessary to facilitate the deployment of the new types of carrier current systems.¹² These systems, known as BPL, operate on a Part 15 unlicensed basis using power lines as a transmission medium to provide high-speed communications capabilities by coupling RF energy into the power line.¹³ In the *BPL NOI*, the Commission outlined two types of BPL: (1) In-House BPL, BPL systems that operate inside a building; and (2) Access BPL, BPL systems operating over utility poles and medium voltage power lines.¹⁴ In 2004, the Commission released a notice of proposed rulemaking proposing to amend Part 15 to address Access BPL technology.¹⁵ The Commission subsequently released the *Access BPL Order*, which adopted definitions for Access BPL and In-House BPL; new operational requirements for Access BPL concerning harmful interference; new administrative requirements to identify Access BPL installations; and specific measurement guidelines and certification requirements to evaluate Access BPL emissions.¹⁶ The Commission has not addressed the question of the regulatory status of BPL-enabled Internet access service in these proceedings or elsewhere.¹⁷

¹¹ *Pleading Cycle Established for Comments on United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service*, WC Docket No. 06-10, Public Notice, DA 06-49 (WCB rel. Jan. 11, 2006). A list of commenters and reply commenters is contained in the Appendix to this Order.

¹² *Inquiry Regarding Carrier Current Systems, including Broadband over Power Line Systems*, ET Docket No. 03-104, Notice of Inquiry, 18 FCC Rcd 8498 (2003) (*BPL NOI*). Part 15 of the Commission's rules sets forth regulation under which devices that generate radio frequency (RF) energy may be operated without an individual license. See 47 C.F.R. Part 15.

¹³ See *BPL NOI*, 18 FCC Rcd at 8498, para. 1.

¹⁴ See *id.* at 8499, para. 3.

¹⁵ *Carrier Current Systems, including Broadband over Power Line Systems; Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Power Lines Systems*, ET Docket Nos. 03-104 and 04-37, Notice of Proposed Rulemaking, 19 FCC Rcd 3335 (2004).

¹⁶ *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems; Carrier Current Systems, including Broadband over Power Line Systems*, ET Docket No. 04-37 and 03-104, Report and Order, 19 FCC Rcd 21265 (2004) (*Access BPL Order*). In response to various petitions for reconsideration to the *Access BPL Order*, the Commission generally affirmed its order and further amended Part 15 of the Commission's rules regarding the unlicensed operation of Access BPL. *Amendment of Part 15 Regarding New Requirements and Measurement Guidelines for Access Broadband over Power Line Systems; Carrier Current Systems, including Broadband over Power Line Systems*, ET Docket Nos. 04-37 and 03-104, Memorandum Opinion and Order, FCC 06-113 (rel. Aug. 7, 2006).

¹⁷ The Commission, however, has sought comment more broadly on various consumer protection issues to be addressed in the broadband era. See *Consumer Protection in the Broadband Era Notice*, 20 FCC Rcd at 14929-35, (continued...)

2. Prior Commission Classification of Broadband Internet Access Services

5. The Commission has addressed the classification of broadband Internet access services in two orders: the *Cable Modem Declaratory Ruling* and the *Wireline Broadband Internet Access Services Order*. The Commission released the *Cable Modem Declaratory Ruling* in 2002, classifying cable modem service as an interstate information service, which includes no separate offering of a telecommunications service.¹⁸ The Commission found that the classification of cable modem service depended on the nature of the functions that the end user is offered and that cable modem service, in fact, combined “the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications.”¹⁹ As a part of the classification, the Commission determined that the *Computer Inquiry* obligation to offer the transmission underlying any information service on a common carrier basis did not apply to information services provided over cable facilities.²⁰ The Supreme Court later upheld, as a lawful construction of the Act, the Commission’s conclusion that cable companies that sell broadband Internet service do not provide “telecommunications services” and therefore are exempt from mandatory Title II common-carrier regulation.²¹

6. On September 23, 2005, the Commission issued the *Wireline Broadband Internet Access Services Order*, which, among other things, established a new regulatory framework for broadband Internet access services offered by wireline facilities-based providers.²² The Commission acted to further its goal of “developing a consistent regulatory framework across platforms by regulating like services in a similar functional manner.”²³ There, the Commission found that wireline broadband Internet access is an information service because it offers end users “the capability for ‘generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.’”²⁴ The Commission also determined that neither the Communications Act nor relevant precedent mandated that broadband transmission be a telecommunications service when provided to an ISP, but the provider may choose to offer it as such.²⁵ The Commission further determined that the use of the transmission component of wireline broadband Internet access service as part of a facilities-based provider’s offering of that service to end users using its own transmission facilities is “telecommunications” and not a “telecommunications service” under the Act.²⁶ Additionally, the

(Continued from previous page) _____

paras. 146-59 (seeking comment on consumer protection needs for all providers of broadband Internet access services regardless of the underlying technology).

¹⁸ See *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4802, para. 7.

¹⁹ *Id.* at 4822, para. 38.

²⁰ See *id.* at 4825-26, paras. 44-46.

²¹ See *NCTA v. Brand X*, 125 S. Ct. at 2695, 2702-10.

²² See generally *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd 14853.

²³ *Id.* at 14855, para. 1.

²⁴ *Id.* at 14863, para. 14 (quoting 47 U.S.C. § 153(20)).

²⁵ See *id.* at 14909-10, para. 103.

²⁶ See *id.* at 14910-11, para. 104.

Commission noted that the broadband Internet access market had several emerging platforms and providers in most areas of the country.²⁷ The Commission also eliminated the *Computer Inquiry* requirements applicable to wireline broadband Internet access services offered by facilities-based providers.²⁸

III. DISCUSSION

7. For the reasons discussed below, we classify BPL-enabled Internet access service to be an information service under the Act. We also conclude that the transmission component underlying BPL-enabled Internet access service is “telecommunications,” and that the offering of this telecommunications transmission component as part of a functionally integrated, finished BPL-enabled Internet access service offering is not a “telecommunications service.” Further, we find that neither the Communications Act nor relevant precedent mandates that broadband transmission be a “telecommunications service” when provided to an ISP as a wholesale input for the ISP’s own BPL-enabled Internet access service offering, but that the BPL provider may choose to offer it as such. Additionally, we deny requests from commenters either to condition the information service classification or to place additional requirements on BPL-enabled Internet access services.

A. BPL-enabled Internet Access Service Is an Information Service

8. We find that BPL-enabled Internet access service is an information service.²⁹ This classification is consistent with the Commission’s classifications of cable modem service, as affirmed by the Supreme Court, and of broadband Internet access services offered by wireline facilities-based providers.³⁰

9. The Act defines “information service” as:

the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.³¹

²⁷ See *id.* at 14856, para. 3.

²⁸ See *id.* at 14857, 14872-98, paras. 4, 32-85.

²⁹ See UPLC Petition at 1 (requesting that the Commission find that BPL-enabled Internet access service is an information service).

³⁰ See *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4820-24, paras. 34-41; *NCTA v. Brand X*, 125 S. Ct. at 2695, 2702-10; *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14862-65, paras. 12-17.

³¹ 47 U.S.C. § 153(20). The Act also defines “telecommunications service.” See 47 U.S.C. § 153(46) (defining “telecommunications service” as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used”); see also 47 (continued....)

Some commenters assert that BPL-enabled Internet access service, like cable modem and DSL services, meets this statutory definition.³² Specifically, the record reveals that BPL-enabled Internet access service provides “high-speed Internet access, and a host of applications, including email, web-surfing, etc. that provide the ‘capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications.’”³³ We agree that these characteristics of BPL-enabled Internet access service are similar to the characteristics that the Commission relied upon in classifying cable modem service and wireline broadband Internet access service as “information services.”³⁴ Applying this precedent and the statutory “information service” definition, we conclude that BPL-enabled Internet access service is an information service.³⁵ Specifically, we find that BPL-enabled

(Continued from previous page) _____

U.S.C. § 153(43) (defining “telecommunications” as “the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received”).

³² See, e.g., UPLC Petition at 3; SDG&E Comments at 2-3 (arguing that BPL-enabled Internet access service is like cable modem and DSL service); TIA Comments at 3 (noting that BPL services is “functionally and technically comparable to cable modem and wireline broadband Internet access services”); UPLC Comments at 14 (stating that BPL-enabled Internet access service is similar to cable modem service and DSL service).

³³ See, e.g., UPLC Petition at 4 (citing 47 U.S.C. § 153(20)); FirstCom Comments at 4-5 (comparing BPL-enabled Internet access service to cable modem and wireline broadband Internet access services); Progress Energy Comments at 2-3 (contending that BPL-enabled Internet access service should receive the same classification as cable modem and wireline broadband Internet access services); SDG&E Comments at 2 (stating that BPL-enabled Internet access service is the functional equivalent to cable modem and wireline broadband Internet access services); TIA Comments at 3 (noting that cable modem and wireline broadband Internet access services are functionally and technically comparable to BPL-enabled Internet access service); CURRENT Reply at 2 (relying on the *Brand X* decision and the *Wireline Broadband Internet Access Services Order* to reach a similar result for classifying BPL-enabled Internet access service); see also *infra* Section III.B for a discussion of the “via telecommunications” component of the information service definition.

³⁴ See *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14860, para. 9 (finding that wireline broadband Internet access service uses wireline facilities to provide Internet access capabilities); *id.* at 14862-65, paras. 12-17 (finding that the capabilities of wireline broadband Internet access service provide more than pure transmission without a change in form or content of the information, and that there is no reason to distinguish between wireline broadband Internet access services offered via a self-provided transmission component or via a transmission facility owned by another party); *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4822, para. 38 (concluding that cable modem service is an information service because it combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications).

³⁵ We emphasize that in finding BPL-enabled Internet access service to be an information service, we do not reach the issue of how to classify BPL itself or other Internet-based services that electric utilities may offer. See, e.g., Current Reply at 2 (noting that the petition does not seek clarification on the regulatory classification of “BPL”). However, we do address below the regulatory flexibility that a provider has in offering the transmission component of BPL-enabled Internet access service. See *infra* Section III.B. Directing our focus to the broadband Internet access services raised in the Petition without prejudging other offerings over the BPL platform parallels the Commission’s approach for classifying services provided over cable systems and other technologies. See, e.g., *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4819, para. 31 n.129 (determining at that time not to consider other Internet-based services that cable operators may offer, such as service on virtual private networks). Accordingly, our decision here does not address issues such as those raised by commenters regarding the overall ability of BPL providers to offer services pursuant to Title II. See, e.g., COMPTTEL Comments at 9-10 (arguing that (continued...))

Internet access service is an information service because it offers a single, integrated service (*i.e.*, Internet access) to end users, in that BPL-enabled Internet access service combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications (*e.g.*, e-mail, web pages, and newsgroups).³⁶ These applications encompass the capability for “generating, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications,” and taken together constitute an information service as defined by the Act.³⁷

10. Further, we find that classifying BPL-enabled Internet access service as an information service furthers the goals of sections 7 and 230(b)(2) of the Communications Act, and section 706 of the Telecommunications Act of 1996 (1996 Act).³⁸ Through this classification, we are encouraging the deployment of broadband Internet access services.³⁹ Additionally, we believe that BPL-enabled Internet access service can provide an important homeland security function by creating redundancy in our communications infrastructure and can be used to build smart grids to monitor the provision of electrical service.⁴⁰ As the Commission has noted previously with the classification of wireline broadband Internet access services, we similarly find that our actions in this Order will not affect the government’s implementation or enforcement of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept or Obstruct Terrorism Act of 2001 (USA PATRIOT Act),⁴¹ or the Commission’s rules implementing the National Security Emergency Preparedness (NSEP) Telecommunications Service Priority (TSP) System.⁴²

(Continued from previous page) _____

if BPL is classified as an information service, BPL providers will lose compulsory interconnection rights under section 251(a)(1)).

³⁶ See *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14863, para. 14.

³⁷ *Id.* at 14863-64, paras. 14-15.

³⁸ See 47 U.S.C. § 157 (stating that it is the policy of the United States “to encourage the provision of new technologies and services to the public”); 47 U.S.C. § 230(b)(2) (stating that it is the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet”); 47 U.S.C. § 157 nt (directing that the Commission shall encourage the deployment of advanced telecommunications capability to all Americans); see also UPLC Comments at 9-10.

³⁹ Many of the commenters either are actively engaged in developing BPL systems or are exploring BPL technologies. See, *e.g.*, Duke/Cinergy Comments at 1-2 (asserting that both Duke Energy Corporation and Cinergy Broadband, LLC are developing BPL technologies); SDG&E Comments at 1 (stating that San Diego Gas & Electric Company is exploring whether to develop BPL technology); UPLC Comments at 4 (stating that over 40 trial deployments of BPL service are underway).

⁴⁰ See, *e.g.*, UPLC Petition at 6 (asserting that BPL-enabled Internet access service furthers public safety and homeland security goals); Duke/Cinergy Comments at 3 (same); SDG&E Comments at 4 (same).

⁴¹ P.L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of 18 U.S.C., 47 U.S.C., 50 U.S.C.).

⁴² 47 C.F.R. Part 64, App. A. See *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14917-18, paras. 115-18. We also disagree with any suggestion that our decision here will adversely affect law enforcement’s ability to conduct surveillance on users of BPL services. See, *e.g.*, COMPTTEL Comments at 4-5. In the *CALEA Order*, the Commission found that providers of facilities-based broadband Internet access service, including broadband access via power line, among other services, are subject to CALEA. See *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295 & RM-10865, First Report and (continued....)

11. Having concluded that BPL-enabled Internet access service is an information service, we also find that the service is an interstate service to the same extent as cable modem service and wireline broadband Internet access service.⁴³

B. The Transmission Component of BPL-enabled Internet Access Service Is “Telecommunications” and Not a “Telecommunications Service”

12. UPLC requests that the Commission remove any uncertainty as to whether BPL-enabled Internet access service is subject to regulation under Title II of the Act.⁴⁴ A critical aspect of removing this uncertainty is the statutory classification of the transmission component underlying that service.⁴⁵ We find that this transmission component is “telecommunications” and that the offering of this telecommunications transmission component as part of a functionally integrated finished BPL-enabled Internet access service offering is not a “telecommunications service” under section 3 of the Act. We also find that neither the Communications Act nor relevant precedent mandates that broadband transmission be a “telecommunications service” when provided to an ISP as a wholesale input for the ISP’s own BPL-enabled Internet access service offering, but that the BPL provider may choose to offer it as such.

13. The Act defines both “telecommunications” and a “telecommunications service,” and the Commission has already recognized that “[a]ll information services require the use of telecommunications to connect customers to the computers or other processors that are capable of generating, storing, or manipulating information.”⁴⁶ The Commission has also determined that the transmission of information

(Continued from previous page) _____

Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, 15001, para. 24 (2005) (*CALEA Order*), *aff’d*, *American Council on Educ. v. FCC*, 451 F.3d 226 (D.C. Cir. 2006). As the Commission explained, providers of facilities-based broadband Internet access service satisfy the CALEA definition of “telecommunications carrier” even if the service they provide has been classified as an information service under the Communications Act. *See id.* at 15001, para. 23 (2005) (finding that “[d]ecisions about the applicability of CALEA must be based on CALEA’s definitions alone,” and that the “classification of a service provider as a telecommunications carrier under CALEA’s Substantial Replacement Provision *does not limit* the Commission’s options for classifying that provider or service under the Communications Act”) (emphasis in original).

⁴³ *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4832, para. 59 (using the end-to-end analysis to determine that cable modem service is jurisdictionally interstate); *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd 14853; *see also GTE Tel. Operating Cos.*, Memorandum Opinion and Order, 13 FCC Rcd 22466 (1998) (finding GTE’s ADSL service to be properly tariffed as an interstate service), *recon. denied*, 17 FCC Rcd 27409 (1999).

⁴⁴ *See* UPLC Petition at 1.

⁴⁵ As the Commission explained in the *Wireline Broadband Internet Access Services Order*, classifying the transmission component is essential to determine whether provision of a service is subject to Title II regulation. There, the Commission recognized that if a transmission component is a telecommunications service, then the provision of that service is subject to common carrier regulation under Title II. Conversely, if it is not, then providers of that transmission component are not subject to Title II requirements except to the extent that the Commission imposes such obligations pursuant to the Commission’s ancillary jurisdiction under Title I. *See Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14909, para. 102.

⁴⁶ *See supra* note 31; *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, Order on Remand, 16 FCC Rcd 9751, 9770, para. 36 (2001).

may constitute “telecommunications,” but that it is not necessarily a “telecommunications service.”⁴⁷ UPLC asserts that BPL-enabled Internet access service includes “telecommunications” because it is “an integrated finished service that combines computer processing with transport capabilities, like cable modem and DSL services.”⁴⁸

14. We agree that the transmission underlying BPL-enabled Internet access is “telecommunications” because it provides “transmission, between or among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.”⁴⁹ BPL systems share technical similarities with DSL and cable modem, in that BPL works by amplifying a digital signal over the electrical current on power lines similar to the way that DSL works by amplifying a digital signal over the voice signal on telephone lines.⁵⁰ We conclude, consistent with the Commission’s finding in the *Wireline Broadband Internet Access Services Order*, that the use of this telecommunications transmission component as part of a facilities-based provider’s offering of BPL-enabled Internet access service to end users using its own transmission facilities is not a “telecommunications service” because it is part and parcel of the Internet access service’s information service capabilities.⁵¹ Specifically, we find that an end user subscribing to BPL-enabled Internet access service expects to receive (and pay for) a finished, functionally integrated service that provides access to the Internet, rather than receive (and pay for) two distinct services – Internet access service and a distinct transmission service.

15. Additionally, if a BPL provider chooses to offer the telecommunications transmission component as a telecommunications service, then it is a common carrier service subject to Title II.⁵²

⁴⁷ See *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9179-81, paras. 788-90 (1997) (finding that information services are not inherently telecommunications services simply because they are offered via telecommunications).

⁴⁸ UPLC Petition at 3; see, e.g., FirstCom Comments at 9 (arguing that to protect the reliability of the power networks BPL-enabled services should not be required to offer transmission capacity separately to others); UPLC Comments at 6 (contending that BPL-enabled Internet access service is a finished service that combines transmission and information processing inextricably); Duke Reply at 3 (requesting that the Commission find that BPL-enabled Internet access service does not have a separate transmission component and that neither electric utilities nor BPL operators should be required to offer one); UPLC Reply at 7 (stating that no commenters challenge the statement that BPL-enabled Internet access service is a “finished service that inextricably intertwines data transport and information processing capabilities”). But see, e.g., COMPTTEL Comments at 8-9 (arguing that UPLC asserts that BPL-enabled Internet access service “inextricably intertwines information processing and data transmission into a seamless service offering” without any factual support).

⁴⁹ 47 U.S.C. § 153(43).

⁵⁰ See UPLC Petition at 5.

⁵¹ See *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14910-11, para. 104 (stating that, consistent with the Supreme Court’s opinion in *Brand X*, the use of the transmission component as part and parcel of a facilities-based provider’s offering to end users of wireline broadband Internet access service using its own transmission facilities is “telecommunications” and not a “telecommunications service”).

⁵² See *id.* at 14909-10, para. 103 (finding that a provider of the transmission component for wireline broadband Internet access service may offer the transmission on a common carrier basis if it chooses to, thus subjecting it to Title II common carrier regulations); see also, e.g., COMPTTEL Comments at 7-8 (arguing that if BPL providers offer their service on a common carrier basis then they are not information service providers); FirstCom Comments (continued....)

However, we find nothing in the Communications Act or our precedent that compels a facilities-based provider to offer the transmission component of BPL-enabled Internet access service as a telecommunications service. Additionally, we decline to mandate, through our Title I ancillary jurisdiction, that the transmission component of BPL-enabled Internet access service provided as a wholesale input to ISPs, including affiliates, be offered as a telecommunications service.⁵³ Further, we make clear that no aspect of the *Computer Inquiry* regime applies to the provision of BPL-enabled Internet access service. In particular, no facilities-based provider of BPL-enabled Internet access service has an obligation to provide the transmission component of that service as a common carrier service, regardless of whether the provider is otherwise a common carrier.⁵⁴ We believe, as the Commission explained in the *Cable Modem Declaratory Ruling* in reference to cable modem service, that subjecting BPL-enabled Internet access service providers to these obligations would disserve the goals of section 706 of the 1996 Act.⁵⁵

C. Other Issues Raised by Commenters

16. We conclude that the other concerns raised by commenters are outside the scope of this proceeding. Some commenters request that the Commission either condition the classification of BPL-enabled Internet access service or place additional requirements on BPL-enabled Internet access service. Specifically, these commenters raise concerns regarding interference and pole attachment access.⁵⁶ While these issues are important, we find that they are outside the scope of this proceeding and

(Continued from previous page) _____

at 10 (arguing that electric utilities should not be compelled to offer a separate telecommunications transmission component).

⁵³ See *Wireline Broadband Internet Access Services Order*, 20 FCC Rcd at 14909-10, para. 103 (finding that neither the statute nor the *NARUC* precedent mandates that the broadband transmission of wireline broadband Internet access service be a telecommunications service when provided to an ISP). As such, we disagree with commenters that suggest that BPL-enabled Internet access service is not entitled to classification as an information service simply because certain electric utilities sell the transmission component of that service to ISPs, which in turn sell it to end users as a component of their finished BPL-enabled Internet access service offerings. See, e.g., COMPTTEL Comments at 9.

⁵⁴ See *Cable Modem Declaratory Ruling*, 17 FCC Rcd at 4825, para. 43 & n.169 (finding that the *Computer II* obligations have only been applied to traditional wireline services and facilities, which the Commission has explicitly limited to services provided over the infrastructure of traditional telephone networks, and declining to extend such obligations to information services provided over cable facilities).

⁵⁵ See *id.* at 4826, para. 47.

⁵⁶ See, e.g., Joint Cable Operators Comments at 8 (requesting that the Commission condition any information services classification on a requirement that power companies perform reasonable make-ready for pole facilities available when there would otherwise be no room to attach a new wire); NextG Comments at 1-2 (requesting that the Commission condition its classification decision on new rights-of-way and pole attachment rules); Panasonic Comments at 5-6 (arguing for conditions based on the use of “coexistence protocol” to eliminate the impact of interference to In-House BPL networks); NTCA Reply at 2 (arguing that electric utilities intend to cross-subsidize BPL services); Letter from Christopher A. Fedeli, Cole, Raywid & Braverman, L.L.P., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-10 (filed Mar. 21, 2006) (urging the Commission to adopt additional regulations dealing with pole attachment rights, in conjunction with classifying BPL-enabled Internet access service); Letter from Maria T. Browne, Cole, Raywid & Braverman, L.L.P., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-10 (filed Mar. 21, 2006) (reiterating the comments of NextG Networks, Inc. and Virtual Hipster in regard to pole attachment issues).

are better addressed in other proceedings pending before the Commission.⁵⁷ In particular, we note that in the *Consumer Protection in the Broadband Era Notice* the Commission seeks comment on whether to impose additional obligations on all providers of broadband Internet access service, including BPL-enabled Internet access service, under the Commission's Title I ancillary jurisdiction.⁵⁸ Further, we find that resolving the narrow classification issues of BPL-enabled Internet access service immediately will promote the deployment of BPL technology and the proliferation of this nascent service.⁵⁹ Perhaps more importantly, we find that saddling this service with conditions that do not apply to other competing forms of broadband Internet access services would create a regulatory disparity antithetical to our creation of a level playing field for all modes of this service.

IV. ORDERING CLAUSE

17. Accordingly, IT IS ORDERED, that pursuant to sections 1-4, 201(b), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-54, 201(b), and 303(r), section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt, and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that UPLC's Petition for Declaratory Ruling IS GRANTED, as described herein.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁵⁷ See *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 (2004) (seeking comment on various issues regarding Internet Protocol (IP)-enabled services); *Consumer Protection in the Broadband Era Notice*, 20 FCC Rcd at 14929-30, para. 146 (seeking comment on consumer protection needs for all providers of broadband Internet access services regardless of the underlying technology); Petition for Rulemaking of Fibertech Networks, LLC, RM-11303 (filed Dec. 7, 2005) (requesting that the Commission adopt a set of "best practices" addressing competitor access to poles and conduct); Petition of the United States Telecom Association for a Rulemaking to Amend Pole Attachment Rate Regulation and Complaint Procedures, RM-11293 (filed Oct. 11, 2005) (requesting that the Commission institute a rulemaking to amend existing rules governing pole attachment rates, terms, and conditions).

⁵⁸ See *Consumer Protection in the Broadband Era Notice*, 20 FCC Rcd at 14929-35, paras. 146-59.

⁵⁹ We reject commenter claims that we do not have a sufficient record to address this issue or that we should defer our decision on classification until we have addressed other policy issues. Compare, e.g., COMPTEL Comments at 2; NJ Ratepayer Comments at 4; NTCA Comments at 1; PaPUC Comments at 2, 4; Virtual Hipster Comments at 4; NTCA Reply at 1; PaPUC Reply at 7, with, e.g., Duke Reply at 2; UPLC Reply at 10. Additionally, we disagree with commenter arguments that UPLC did not sufficiently plead its case because UPLC's petition does not discuss the statutory provisions of Title II that UPLC believes apply to BPL-enabled Internet access service today. See, e.g., COMPTEL Comments at 3 (citing to the Commission's decision in *SBC Communications Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, Memorandum Opinion and Order, 20 FCC Rcd 9361 (2005), *remanded sub nom. AT&T Inc., f/k/a SBC Communications Inc. v. FCC*, 452 F.3d 830 (D.C. Cir. 2006)). We note that as this is not a forbearance proceeding, section 10 of the Act does not determine the specific pleading requirements necessary in this proceeding.

**APPENDIX
LIST OF COMMENTERS**

Comments Filed in Response to the Public Notice in WC Docket No. 06-10

<u>Comments</u>	<u>Abbreviation</u>
COMPTEL	COMPTEL
Duke Energy Corporation and Cinergy Broadband, LLC	Duke/Cinergy
First Communications, LLC	FirstCom
Florida Cable & Telecommunications Association; Cable Television Association of Georgia; Cable Telecommunications Association of Maryland, Delaware, and the District of Columbia; California Cable & Telecommunications Association; South Carolina Cable Television Association; Alabama Cable Telecommunications Association	Joint Cable Operators
New Jersey Division of the Ratepayer Advocate	NJ Ratepayer
NextG Networks, Inc.	NextG
The National Telecommunications Cooperative Association	NTCA
Panasonic Corporation of North America	Panasonic
The Pennsylvania Public Utility Commission	PaPUC
Progress Energy, Inc.	Progress Energy
San Diego Gas & Electric Company	SDG&E
The Telecommunications Industry Association	TIA
The United Power Line Council	UPLC
Virtual Hipster Corporation	Virtual Hipster

Reply Comments Filed in Response to the Public Notice in WC Docket No. 06-10

<u>Reply Comments</u>	<u>Abbreviation</u>
CURRENT Communications Group, LLC	CURRENT
Duke Energy Corporation	Duke
Florida Cable & Telecommunications Association; Cable Television Association of Georgia; Cable Telecommunications Association of Maryland, Delaware, and the District of Columbia; California Cable & Telecommunications Association; South Carolina Cable Television Association; Alabama Cable Telecommunications Association	Joint Cable Operators
The National Telecommunications Cooperative Association	NTCA
The Pennsylvania Public Utility Commission	PaPUC
The United Power Line Council	UPLC

**STATEMENT OF
CHAIRMAN KEVIN J. MARTIN**

Re: United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, WC Docket No. 06-10

With today's order the Commission takes another important step to promote the deployment of broadband infrastructure. Specifically, by finding that broadband over power line (BPL) Internet access services are information services, the Commission provides the regulatory certainty necessary to foster competition between different broadband platform providers. I believe that it is the Commission's responsibility to help ensure technological and competitive neutrality in communications markets. Accordingly, I believe that all providers of the same service must be treated in the same manner regardless of the technology that they employ. I am therefore pleased that the Commission has recognized that Internet access services provided over broadband power lines, like those provided over cable plant and wireline facilities, are information services.

The Commission's broadband statistics show that subscribers to BPL Internet access services, although few in number overall, increased by nearly 200% in 2005. These services hold great promise for consumers. It is, therefore, critical that the Commission take appropriate action to foster their development. Just a few months ago, we took action to clarify our technical rules pertaining to BPL service. And, today, we clarify their legal status. It is my hope that these actions will promote the growth and competitiveness of this service. By encouraging the development of new technologies, such as BPL, we can best achieve the President's goal of universal broadband by the end of 2007.

**CONCURRING STATEMENT OF
COMMISSIONER MICHAEL J. COPPS**

Re: United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, WC Docket No. 06-10

I concur in today's decision for substantially the same reasons I concurred in our 2005 Order reclassifying DSL service as an information service. As I stated then and continue to believe today, consigning broadband services to an indeterminate Title I regulatory limbo is no substitute for a genuine national broadband strategy. Just relegating something to Title I doesn't provide the kind of certainty that either business or consumers are entitled to if broadband over power line is going to be the success we want it to be. And reclassification by itself gets us no closer to the kind of high speed broadband infrastructure this nation needs to be competitive in world markets and to expand economic and social opportunity here at home.

But as I have said before, I understand that when it comes to regulatory classification questions, the handwriting has long been on the wall. So, for the foreseeable future, new broadband services are destined to be classified as Title I services. This is not the world I would have chosen, but it is the world in which we live. I hope it is a world wherein broadband over power line can find a way to realize its potential and maybe even provide that needed "other pipe" for high-speed broadband deployment.

Even though there has been no real doubt for some time that this Commission would one day declare BPL an information service – given our decisions on DSL and cable modems and the Supreme Court's *Brand X* ruling – we are nowhere near finished defining what being an information service **actually means**. Yes, we have clarified some questions about E911 and CALEA and decided (unwisely, in my view) that broadband providers need not contribute to universal service. But we still haven't addressed important questions about such things as privacy, disabilities access and the future of the Internet. Nor does our decision today provide any certainty on difficult questions raised by BPL as to cross-subsidization and pole attachments – issues that sound pretty dry and technical – but issues that can come back to bite both consumers paying bills and entrepreneurs trying to devise business plans.

We seem to proceed on the happy presumption that if providers are free from legacy Title II regulation they will magically devote their attention and capital to building broadband infrastructure. The results? Well, after several years of Title I reclassification, not many. As other nations race at warp speed into the digital future, this one plods along at turtle velocity. While I dearly hope that BPL providers make real inroads into the cable-telephone broadband duopoly that we have in this country, I really don't think our international standing in broadband is going to improve until this nation develops a real honest-to-goodness broadband strategy, just as every other industrialized nation has done. Consumers want – and consumers deserve – some real competition in this critical market. But avoiding the tough regulatory questions and merely renaming things is not going to usher in that happy result. We are not providing the kind of certainty that business requires, nor any assurance to consumers about what rights they have in the new world of high speed which we hope some day to inhabit. The issues I am talking about today don't go away just because we call something by a different name. I would much rather see this Commission spending more time addressing real-world broadband needs and less time parsing regulatory language without filling in the blanks.

As for our BPL providers, I commend them on their efforts to bring a new broadband pipe into our homes and businesses – particularly in difficult-to-reach places – and I look forward to working with them to encourage an environment where they can truly realize their dreams.

**CONCURRING STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN**

Re: United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, WC Docket No. 06-10

In this Order, the Commission clarifies that the regulatory framework for Broadband-over-Power Line (BPL)-enabled Internet access service should be consistent with the framework established for broadband Internet access services provided over cable modem and wireline broadband facilities. I support this Order because it is consistent with our broader efforts to treat similar services in a similar manner across technology platforms.

In BPL-enabled Internet access, we have a relative newcomer to the Internet access service market but an exciting technology that has the potential to be a new broadband pipe into the home.¹ Fostering BPL services is an important goal because we continue to see a residential broadband market in which, according to FCC statistics, telephone and cable operators control a nearly 98 percent share, with many consumers lacking any meaningful choice of providers. So, if we are to give our communities the communications tools to compete on the global economic stage, it is critical that we take steps to promote much-needed competition in the provision of broadband services.

The legal approach we take here may not be my preferred option but I concur in today's decision for the same reasons that I concurred in our decision last year to reclassify wireline broadband Internet access services.² As I made clear at the time we adopted the *Wireline Broadband Internet Access Order*, the reclassification approach raises some difficult questions about the legal and policy framework for broadband services. My underlying concern with the reclassification approach has always been that it takes the Commission outside the ambit of those core legal protections and grounding afforded by Congress. Yet, I have been willing to move forward because we are acting in a manner consistent with the Supreme Court's guidance in the *Brand X* decision, and this Order, in turn, will give us an opportunity to adopt a consistent approach for cable, wireline, and power line broadband services.

Even as we move forward with this Order today, it is worth mentioning some of the important issues that we shouldn't lose sight of: chief among those is the protection of consumers. Indeed, my support for this approach last year was conditioned on the Commission's decision to use its Title I authority to address important consumer protection and other concerns that continue to be relevant in the broadband age. I premised my support for the *Wireline Broadband Internet Access Order* on our decision to adopt a concurrent and important Notice of Proposed Rulemaking (*Broadband Consumer Protection Notice*) that sought comment on how we can ensure that we continue to meet our consumer protection obligations in the Act. It's now been more than a year since we opened that inquiry, so it's more important than ever that we make this proceeding a priority.

¹ FCC, *High Speed Services for Internet Access: Status as of December 31, 2005*, Table 2 (showing 5,071 advanced services lines provided over "power line and other" technologies) (July 2006).

² Concurring Statement of Commissioner Jonathan S. Adelstein, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, FCC 05-150, Report and Order and Notice of Proposed Rulemaking (August 5, 2005) (*Wireline Broadband Internet Access Order and Broadband Consumer Protection Notice*).

Consumers must be at the top of our list, not the bottom, as we move into the broadband era. Our experience with the widespread and unauthorized proliferation of consumer telephone call records has been a sharp reminder that this Commission has an obligation to ensure that consumers' privacy expectations are met. But that privacy concern is not limited to the narrowband world. Consumers don't care whether their sensitive information is transferred by copper wire, fiber optic cable, or over a power line connection. They merely want us to implement and enforce the legal protections afforded by Congress. We should act immediately to make sure that we have adequate safeguards in place to protect the consumers' sensitive information.

We also need to advance the discussion of other sensitive issues, like our Truth-in-Billing rules, access for persons with disabilities, and the preservation and advancement of universal service. Universal service is a particularly important issue because the Commission has a statutory obligation to ensure the sound footing of our federal programs that ensure access for school, libraries, low income consumers, and hard to reach areas. Last year, when the Commission adopted the *Wireline Broadband Internet Access Order*, the Commission also adopted a transitional plan to ensure the stability of universal service contributions while it considered the broader question of whether facilities-based providers of broadband services should be required to contribute. We've had more than a year since we adopted the *Broadband Consumer Protection Notice* and the transitional plan for universal service, so it is certainly time for the Commission to move forward promptly to address these issues.

On another issue, I appreciate the willingness of Chairman Martin and my colleagues to work with me to ensure that this Order does not unnecessarily limit states' ability to address important issues related to the oversight of BPL. I know that it was important to the BPL industry and my colleagues to address the classification of BPL, so I am glad that we were able to resolve these issues collaboratively.

We would all like to see the injection of a new player in the broadband market and to reap the benefits that increased competition will bring to consumers. So, now that we have removed any question about the regulatory classification of BPL services, we will all watch with anticipation for BPL's continued growth. For all these reasons, I concur in today's Order.

**STATEMENT OF
COMMISSIONER DEBORAH TAYLOR TATE**

Re: United Power Line Council's Petition for Declaratory Ruling Regarding the Classification of Broadband over Power Line Internet Access Service as an Information Service, WC Docket No. 06-10

Along with my colleagues, I have had the opportunity to review BPL demonstrations both in Keller, Texas, and, locally, in Potomac, Maryland. The possibilities created by broadband over power line (BPL) technology are truly amazing. Imagine being able to plug into high-speed Internet wherever there's an electrical outlet. The presence of another broadband platform could help to bolster competition and, hopefully, lower prices for consumers, especially in rural communities. Plus, the presence of an additional data network would help serve an important homeland security function, adding redundancy to our critical infrastructure – this is the potential of BPL, and it is exciting.

This item seeks to eliminate some of the regulatory uncertainty regarding BPL-enabled Internet access service by classifying it as an “information service.” In doing so, we remove significant regulatory uncertainty and place this service on a level playing field with both DSL and cable modem service, both already classified as information services. This is consistent with the Commission's prior actions, and also succeeds in pursuing our objectives while applying only a light regulatory touch. For these reasons, I support this item.